

CHAPTER 10

CREATION OF TRUSTS BY CONTRACT

2. THE SELLER UNDER A SPECIFICALLY ENFORCEABLE CONTRACT

Sale of land

General principle

10–03 NOTE 3. AT THE END OF THE FIRST SENTENCE ADD: *Nelson v Greening & Sykes (Builders) Ltd* [2007] EWCA Civ 1358; (2007–08) 10 I.T.E.L.R. 689 AT [53]. THE CORRECT NEUTRAL CITATION OF *Englewood Properties Ltd v Patel* IS [2005] EWHC 188 (Ch) AND THE DECISION IS REPORTED AT [2005] 1 W.L.R. 1961.

10–04 NOTE 8. THE CORRECT NEUTRAL CITATION OF *Englewood Properties Ltd v Patel* IS [2005] EWHC 188 (Ch) AND THE DECISION IS REPORTED AT [2005] 1 W.L.R. 1961.

10–05 NOTE 20. AT THE END OF THE FIRST SENTENCE ADD: *First Laser Ltd v Fujian Enterprises (Holdings) Co. Ltd* [2011] HKCA 1; (2010–11) 13 I.T.E.L.R. 599 at [76.6]–[76.7] (land, approving this passage). The same applies where a contract to assign a lease when the assignment is subject to the lessor’s consent: *Clarence House Ltd v National Westminster Bank plc* [2009] EWCA 1311; [2010] 1 W.L.R. 1216 at [45].

NOTE 21. AT THE END ADD: *First Laser Ltd v Fujian Enterprises (Holdings) Co. Ltd*, above, at [76.8]; *UBS Global Asset Management (UK) Ltd v Crown Estate Commissioners*, unreported, June 9, 2011, Ch D.

The qualified nature of the trust

10–06 NOTE 28. INSERT AT THE END: *Underwood v R.C.C.* [2008] EWCA Civ 1423; [2009] S.T.C. 239 at [38], citing this passage. A vesting order in favour of the purchaser may accordingly be made in a suitable case: *Re Purkiss* [1999] VSC 386, relying on legislation in terms similar to Trustee Act 1925, s. 44, for which see §§ 18–04 *et seq.*

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NOTE 33. THE CORRECT NEUTRAL CITATION OF *Englewood Properties Ltd v Patel* IS [2005] EWHC 188 (Ch) AND THE DECISION IS REPORTED AT [2005] 1 W.L.R. 1961.

The nature of the relationship

10-07 NOTE 40. FOR THE REFERENCE TO *Snell's Equity*, SEE NOW (32nd edn), § 24-003.

Sale of shares

10-09 NOTE 45: INSERT AT THE END: *Mills v Sportsdirect.com Retail Ltd* [2010] EWHC 1072 (Ch); [2010] All E.R. (D) 111 (May) at [75].

NOTE 46: INSERT AT THE END: *Mills v Sportsdirect.com Retail Ltd*, above, *loc. cit.*

AT THE END OF THE TEXT ADD: The same is true even of quoted shares if the quantity of shares contracted for is not readily obtainable in the market.^{46a} If the contracting seller of the shares wrongly sells the shares to a third party for a higher price, then as with land the purchase money received by the seller is held in trust for the original buyer, subject to an allowance for the price payable by the original buyer.^{46b}

^{46a} *Mills v Sportsdirect.com Retail Ltd*, above, *loc. cit.*, citing *Duncuft v Albrecht* (1841) 12 Sim. 189 at 198. In the case of shares held in uncertificated form, i.e. registered electronically, they are fungible, not being individually identifiable and not appropriated to a particular contract, so there may be some question whether those principles can apply to them: see Palmer's Company Law (25th edn), para. 6.701 *et seq.* and Mills at [76]. We consider, however, that those principles ought to apply nonetheless; cf. *Hunter v Moss* [1994] 1 W.L.R. 452, CA (trust of undifferentiated shares), for which see § 3-06. Uncertificated shares attract the operation of Uncertificated Securities Regulations 2001 (SI 2001/3755, amended as stated in § 34-67), reg.31(2) of which provides that the transferor retains "title" to the shares until the transferee is entered as holder on the relevant issuer register of securities; but we consider that in context "title" means legal title. For uncertificated shares generally, see §§ 34-67 *et seq.*

^{46b} *Luxe Holdings Ltd v Midland Resources Holdings Ltd* [2010] EWHC 1908 (Ch). Provided that the contract is governed by English law, it makes no difference that the shares are foreign shares indirectly owned through subsidiaries of the seller and that under the law of the country where the shares are situated an indirect sale of them is not permitted or trusts are not recognised.

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4. MUTUAL WILLS**General principle***Examples*

10–36(1) DELETE gifts AND REPLACE BY: gift.

Requirements*Need for agreement*

10–37 NOTE 50: AT THE END ADD: *Fry v Densham-Smith* [2010] EWCA Civ 1410; [2010] All E.R. (D) 136 (Dec) at [3].

NOTE 51: AT THE END ADD: *Charles v Fraser* [2010] EWHC 2154 (Ch); (2010–11) 13 I.T.E.L.R. 455.

10–38 NOTE 55: AT THE END ADD: *Charles v Fraser*, above, at [66].

AT THE END OF THE LAST SENTENCE OF THE TEXT INSERT: where that is so.

No need for wills to follow agreement

10–41 AT THE END OF THE TEXT ADD: But in the former case it seems that the doctrine does not apply unless the wills are actually executed in accordance with the agreement.^{62a}

Formalities required

10–43 NOTE 67. AT THE END ADD: *Walters v Olins* [2007] EWHC 3060 (Ch); [2008] W.T.L.R. 339 at [31] (point not taken on appeal, *sub nom. Olins v Walters* [2008] EWCA Civ 782; [2009] Ch. 212).

NOTE 68. DELETE THE REFERENCE TO *Williams on Wills*.

^{62a} *Fry v Densham-Smith* [2010] EWCA Civ 1410; [2010] All E.R. (D) 136 (Dec) at [3]. We do not consider that the court intended in that decision to deal with a case in which the agreement was not to revoke existing wills.

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NOTE 72. AT THE END ADD: In *Walters v Olins*, above, at first instance, *Healey v Brown* was treated (*semble*) as deciding that a contract to make a will disposing of specific property had to comply with the formalities required by the 1989 Act, s.2, see [2007] EWHC 3060 (Ch) at [31] (point not taken on appeal, [2008] EWCA Civ 782).

AT THE END OF THE PENULTIMATE SENTENCE OF THE TEXT INSERT A NEW NOTE 74A: For a discussion of the extent to which s.2 of the 1989 Act precludes a constructive trust (or a proprietary estoppel) when there is an agreement between the parties, see *Whittaker v Kinnear* [2011] EWHC 1479 (QB).

DELETE THE FINAL SENTENCE OF THE TEXT AND REPLACE BY: Until it is, prudence dictates assuming that the 1989 Act may apply.

Obligations of testators—property affected

10–50 AT THE END OF THE FIRST SENTENCE OF THE TEXT INSERT A NEW NOTE 91A: *Walters v Olins* [2007] EWHC 3060 (Ch); [2008] W.T.L.R. 339 at [42], apparently accepted on appeal, *sub nom. Olins v Walters* [2008] EWCA Civ 782; [2009] Ch. 212 at [23], [44]; *Fazari v Cosentino* [2010] WASC 40 at [29]–[31].

AT THE END OF THE SECOND SENTENCE OF THE TEXT INSERT A NEW NOTE 91B: Note that the agreement may extend to T2’s entire estate and not merely to that part of it (if any) derived from T1: see § 10–40 and the assumption made in *Walters v Olins* [2007] EWHC 3060 (Ch); [2008] W.T.L.R. 339 at [42], apparently accepted on appeal, *sub nom. Olins v Walters* [2008] EWCA Civ 782; [2009] Ch. 212 at [23], [44]; *Fazari v Cosentino*, above, at [31].

10–51 NOTE 98. AT THE END ADD: See the further the discussion of the effect of *Palmer v Bank of New South Wales* (1975) 133 C.L.R. 150, Aus. HC in *Fazari v Cosentino* [2010] WASC 40.

How mutual wills take effect

10–54 NOTE 6. INSERT AT THE END OF THE FIRST SENTENCE OF THE TEXT: *Olins v Walters* [2008] EWCA Civ 782; [2009] Ch. 212 at [37]–[39], [42].

NOTE 8. AT THE END ADD: See too *Russo v Russo* [2009] VSC 491.

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AT THE END OF THE LAST SENTENCE OF THE TEXT INSERT A NEW NOTE 9A: In *Olins v Walters* [2008] EWCA Civ 782; [2009] Ch. 212, a claim was made for an injunction *quia timet* against T2 (who was still alive) but abandoned because of the difficulty in formulating it: see *ibid.* at [26] and, at first instance, [2007] EWHC 3060 (Ch); [2008] W.T.L.R. 339 at [6].

10–56 NOTE 13. *Barns v Barns* IS REPORTED AT (2003) 214 C.L.R. 169.

5. OTHER CONTRACTS AND COVENANTS TO MAKE A WILL**General**

10–59 AT THE END OF THE LAST SENTENCE OF THE TEXT INSERT A NEW NOTE 20A: Though a contract to leave a pecuniary legacy creates no trust, it will nonetheless bind the estate and damages can be recovered for breach of it, see *e.g. Soulsbury v Soulsbury* [2007] EWCA Civ 969; [2007] W.T.L.R. 1841.

10–61 NOTE 27. AT THE END ADD: *Thorner v Major* [2008] EWCA Civ 732; [2008] W.T.L.R. 1289 at [53], *obiter* (appeal allowed without adverting to this point, [2009] UKHL 18; [2009] 1 W.L.R. 776).

10–65 NOTE 38. AT THE END ADD: *Thorner v Major* [2008] EWCA Civ 732; [2008] W.T.L.R. 1289 at [53], *obiter* (appeal allowed without adverting to this point, [2009] UKHL 18; [2009] 1 W.L.R. 776).

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